SUPREME COURT OF APPEALS OF VIRGINIA.

BEMISS *et al. v.* COMMONWEALTH *et al.*

June 13, 1912.

[75 S. E. 115.]

1. Appeal and Error (§ 1234*)—Liability on Bonds—Extent of Liability.—Under Code 1904, § 3470, providing that the condition of supersedeas bonds shall be to perform and satisfy the judgment, etc., and to pay all actual damages incurred in consequence of the supersedeas was given to suspend the operation of a decree directing the delivery of bonds to a party, damages from the depreciation in the value of the bonds and the loss of the difference in interest between that borne by the bonds and that which could have been realized on the money invested therein are recoverable, although the supersedeas did not contain a provision for the payment of actual damages; the statute being read into every statutory supersedeas given since its passage.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4761-4777; Dec. Dig. § 1234.*]

2. Appeal and Error (§ 1234*)—Liability on Bonds—Extent of Liability.—Where bonds directed by a decree to be delivered to a party depreciated in value during the time the operation of the decree was suspended by supersedeas, the recovery on the supersedeas of the damages from the depreciation cannot be denied, on the ground that by delivery of the bonds after affirmance of the decree the party received all that he was entitled to under the decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4761-4777; Dec. Dig. § 1234.*]

Error to Law and Equity Court of City of Richmond.

Action between the Commercial Trust Company, trustee, and the First National Bank. Judgment against Bemiss and another on the supersedeas bond executed by them, and they bring error. Affirmed.

Munford, Hunton, Williams & Anderson, for plaintiffs in error.
George Bryan, for defendants in error.

KEITH, P. The chancery court of the city of Richmond, by its decree entered on the 17th of March, 1910, directed its clerk to deliver to the First National Bank of Richmond, Va., or to George Bryan, its attorney, Virginia century bonds of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

face value of $25,500. From this decree an appeal was allowed upon the petition of the Commercial Trust Company, and a supersedeas bond in the penalty of $1,000 was required, which was executed by Bemiss and Williams, the plaintiffs in error, and bears date the 12th of May, 1910. The condition of this bond was that if the said petitioners "shall perform and satisfy the decree in case the same be affirmed, or said appeal and supersedeas be dismissed, and shall also pay all damages, costs, and fees which may be awarded against or incurred by them, then this obligation to be void; otherwise, to remain in full force and virtue."

The decree appealed from was affirmed and the First National Bank gave notice that on a certain day it would move the law and equity court of the city of Richmond for a judgment against the petitioners, Bemiss and Williams, for the penalty of the bond, claiming that the costs and damages sustained amounted to $1,519.26, of which sum $828.75 was for alleged depreciation in value of the bonds during the period the decree of March 17, 1910, was suspended by the appeal, and $690.51, difference between interest at 6 per cent. on the market value of the bonds and 3 per cent. interest on the face value of said bonds, during the same period.

The petitioners here, defendants in the court below, craved oyer of said bond and demurred to the notice; the ground of demurrer being that the condition of the bond, to pay "all damages, costs, and fees which may be awarded against or incurred by them," does not cover such costs and damages as are set out in the notice.

The court overruled the demurrer, the petitioners pleaded conditions performed, and, a jury having been waived, the whole matter of law and fact was submitted to the court. The facts agreed were as follows: That the Virginia century bonds, between the 17th day of March, 1910, and the 11th day of March, 1911, depreciated in market value $697.50; that between the dates named the First National Bank loaned money at a rate of interest as high as 6 per cent. but that the average rate was 5½ per cent.; that the money collected from the United States on account of the Mohawk was, upon the recommendation of the receiver, invested in Virginia century bonds in order that the fund should be exempt from taxation; that the bank could have realized 2½ per cent. interest on the cost of said bonds in addition to the 3 per cent. interest which was paid on the face value of said bonds, which, between the dates named, would have been $575, but the money invested in said bonds would have been liable to taxes, which, between the dates named, would have amounted to $402.50 leaving the amount

claimed to have been lost by the plaintiff on account of interest $172.50; that either party may rely upon the printed record in the case of Commercial Trust Company, Trustee, *v.* First National Bank, and the opinion handed down on March 9, 1911 (112 Va. —, 70 S. E. 532), as fully as if the same had been fully set out; that because of the supersedeas granted in the case the $25,500 of Virginia century bonds referred to in the decree of March 17, 1910, were retained in the custody of the clerk of the court from the 17th day of March, 1910, to the 13th day of March, 1911, at which date they were delivered under and pursuant to the terms and conditions of said decree to the First National Bank, and no other or further payment has been made to the said bank in satisfaction of said decree; that if, at any time subsequent to said 17th day of March, 1910, the First National Bank had made application to the chancery court to have entered an order directing that the aforesaid century bonds be sold and the proceeds held to await the result of this litigation, Eppa Hunton, Jr., of counsel for the Commercial Trust Company, would have made no objection to such a decree for the clients whom he represented, and he believes that no objection would have been made to such a decree by counsel for the other appellants in the suit of Commercial Trust Company *v.* First National Bank; that on the 20th day of July, 1911, the court entered a judgment against Bemiss and Williams for the sum of $697.50 on account of the depreciation in value of the bonds mentioned in said notice of motion for judgment, and the further sum of $172.50 on account of interest as set forth in said notice, with interest on both sums from the 13th day of March, 1911, to which action of the court Bemiss and Williams excepted. To that judgment a writ of error was awarded, and the case is before us for consideration.

[1] Upon the demurrer the plaintiffs in error rely chiefly upon the case of Cardwell *v.* Allen, Trustees, 69 Va. 184. The opinion there construed section 13 of chapter 178 of the Code of 1873, which sets forth the condition of an appeal and supersedeas bond to be to "pay all damages, costs and fees which may be awarded against or incurred by the appellants or petitioners," and it was held that this language was not broad enough to cover the rents and profits of real estate in the possession of the appellant. The language of the bond in the present case is identical with that construed in the case just cited; but the statute upon the subject has been amended, and so much of it as is pertinent to the question before us reads as follows: The condition of the bond, if a supersedeas be awarded, shall be "to berform and satisfy the judgment, decree, or order, or the part thereof, proceedings on which are stayed, in case the said judg-

ment, decree, or such part, be affirmed, or the appeal, writ of error, or supersedeas, be dismissed, and also to pay all damages, costs, and fees, which may be awarded against or incurred by the appellants or petitioners, in the appellate court, and all actual damages incurred in consequence of the supersedeas."

It is unnecessary to consider what our opinion would be as to the binding force of Cardwell *v.* Allen, supra, had there been no change in the statute since that case was decided. It is true that the language of the bond in this case is identical with the language of the bond in that case, and it may be conceded that the construction placed upon the statute by the court in Cardwell *v.* Allen would not have embraced the damages claimed by the notice in the case before us. The statute, however, has made a radical change, and has provided that the bond shall be for the payment of all damages, costs, and fees, and all actual damages incurred in consequence of the supersedeas, which is broad enough to cover the damages in question; the whole contention in support of the demurrer being, that, as this court had held in Cardwell *v.* Allen that the condition to pay all damages, costs, and fees was not broad enough to cover the rents and profits of real estate, it is not broad enough to cover the damages claimed in this case. When the change in the statute was made, it was the purpose of the Legislature to enlarge the scope of the supersedeas bond and to extend its protection to cases not theretofore embraced in it, and that statute is, we think, to be read into every statutory supersedeas bond which has been executed since its passage. Had the statute in the Code of 1873, which was construed in the case of Caldwell *v.* Allen, been such as we now find it to be in section 3470 of the Code of 1904, we cannot for a moment believe that the condition of the bond before us, which is to pay all damages, costs, and fees, would not have been held sufficient to cover the rents of real estate in the hands of the appellant, which were excluded by the judgment of the court in Cardwell *v.* Allen, and sufficient to embrace all actual damages incurred in consequence of the supersedeas, although the latter phrase had not in terms been set out in the supersedeas bond as it was executed.

We are of opinion that there was no error in the judgment of the law and equity court upon the demurrer.

[2] It is also claimed, on behalf of the plaintiffs in error, that the judgment of the law and equity court was erroneous in allowing the sum of $697.50 on account of depreciation in the value of the bonds between the date of the decree, which was the 17th day of March, 1910, and the 11th day of March, 1911, when they were actually delivered to the defendants in error. The contention of plaintiffs in error rests upon the proposition that

inasmuch as it appears that the century bonds were delivered to the defendants in error in kind, and it does not appear that they have ever been sold, they have received what the decree in the case of Commercial Trust Company *v.* First National Bank gave them, and that no loss upon this account has been sustained.

In this view we cannot concur. When the decree of March, 1910, was rendered, which was subsequently affirmed, the bank was entitled to the immediate possession of the century bonds, to do with as to it seemed best. They were worth at that date in the market a certain sum. Possession of them was wrongfully withheld from the bank for about a year, and when the bank actually received them they had depreciated to the amount for which the court gave judgment. The bank, in March, 1911, received what had diminished in value $697.50, as compared with what it was entitled to receive in March, 1910. We think it comes plainly within the condition of the bond.

Upon the whole case we are of opinion that there was no error to the prejudice of the plaintiffs in error, and the judgment is affirmed.

Affirmed.

Note.

This is a case deciding a novel and interesting point, and one which we are surprised has not come up for decision before this.

It has been held that, where the bond is conditioned to pay "all costs and damages that shall be adjudged against said appellant in this appeal," or "as may be allowed upon such writ of error," the failure of the appellate court to adjudge damages on affirmance was held to prevent any recovery on the bond. Cole *v.* Edwards, 104 Ia. 373, 73 N. W. 863; Johnson *v.* Hessel, 134 Pa. St. 315, 19 Atl. 700. See, also, Sanger *v.* Nadlehoffer, 34 Ill. App. 252; Fullerton *v.* Miller, 22 Ind. 1.

Liability Supplied by Statute.—A case supporting the holding of the court here that a term of an appeal bond in the form prescribed by statute is to be read into the bond, although absent therefrom, is Stults *v.* Zohn, 117 Ind. 297, 20 N. E. 154. There it was held that, when the statute expressly provided that the bond should cover damages for rents accruing pending the appeal, but the bond did not include them, yet damages were recoverable therefor, as "the parties must be held to have contracted with reference to the statute, the provisions of which became as much a part of the bond as if they had been expressly incorporated into it.' See, also, Opp *v.* Ten Eyck, 99 Ind. 345; Conger *v.* Robinson, 4 Sm. & M. (Miss.), 210, where a statute declaring the obligors liable for the debt, damages and costs, has been held to impose the liability for all damages suffered because of the appeal.

The ruling of the Virginia Court under the old statute (Cardwell *v.* Allen, 69 Va. 184), is supported by the U. S. Supreme Court and the Supreme Court of Massachusetts. See Kountze *v.* Omaha Hotel Co., 107 U. S. 378, 27 L. Ed. 609; Woodworth *v.* Northwestern Mut. Life Ins. Co., 185 U. S. 354, 363, 46 L. Ed. 945; Burgess *v.* Doble, 149 Mass. 256, 21 N. E. 438; Coolidge *v.* Inglee, 15 Mass. 66. See vol. 2, U. S. Ency. 191.

Rents and Profits.—But recovery may be had upon a supersedeas bond given in a judicial foreclosure proceeding pending in a court of the United States, of the rents and profits which accrued and were collected by the judgment debtor after the confirmation of the sale of the mortgaged property. Woodworth *v.* Northwestern Mut. Life Ins. Co., 185 U. S. 354, 362, 46 L. Ed. 945, distinguishing Kountze *v.* Omaha Hotel Co., 107 U. S. 378, 27 L. Ed. 609. The obligee in a bond which supersedeas an order of a circuit court of the United States confirming a sale of real estate on foreclosure in the state of Nebraska and directing the immediate execution of a deed and delivery of possession thereof to the purchaser, is entitled after that order has been affirmed on the appeal, to recover as damages for the breach of the obligation of the bond the value of the use and possession, that is to say the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond and the appeal in which it was allowed. Woodworth *v.* Northwestern Mut. Life Ins. Co., 185 U. S. 354, 357, 46 L. Ed. 945. Following the reasoning in Kountze *v.* Omaha Hotel Co., 107 U. S. 378, 27 L. Ed. 609, the appropriation by the mortgagor, during the pendency of a wrongful appeal by such mortgagor from an order confirming the sale on foreclosure, of the rents, issues and profits of the land, which equitably belonged to the purchaser, is "damage" within the meaning of the statute and the condition of the bond. In the Kountze case the mortgagee purchaser was denied the right to recover the rents and profits which had been collected by the mortgagor intermediate the decree of sale and the actual sale of the property. But this was, because the appeal was from a decree ordering a sale, and it was held the mortgagor was not divested of the right to collect and retain the rents and profits of the land before a final determination of a right to sell and a sale made accordingly. The taking by the mortgagor of that which belonged to him and not to the mortgagee it was decided did not constitute an injury to the latter. Woodworth *v.* Northwestern Mut. Life Ins. Co., 185 U. S. 354, 362, 363, 46 L. Ed. 945. In Kountze *v.* Omaha Hotel Co., 107 U. S. 378, 27 L. Ed. 609, the court in its reasoning, made plain the fact that where the real owner of the rents and profits of real estate, in whom the legal as well as equitable title had become vested before action brought upon the bond, was the party for whose benefit the bond on appeal was given, and the effect of the giving of such bond was to enable the mortgagor, the principal in such bond, to appropriate rents, issues and profits of the land during the pendency of the appeal, which equitably belonged to the purchaser, that appropriation constituted "damage" to the obligee in the bond, within the meaning of the condition for payment of "all damages and costs which it may incur by reason or on account of said appeal." Woodworth *v.* Northwestern Mut. Life Ins. Co., 185 U. S. 354, 363, 46 L. Ed. 945, 2 U. S. Sup. Ct. Rep. 191.

J. F. M.